Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

CHARLES PENNINGTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ELLIOTT COUNTY JUDGE EXECUTIVE AND ELLIOTT COUNTY FISCAL COURT,
Petitioners,

v.

LENA HELWIG; ROY SPEARS; JENNIFER L. GILLIAM, ADMINISTRATRIX OF THE ESTATE OF JAMIE GILLIAM; JAMES E. FRAZIER; BURL CARTER; DEBBIE WAGONER; SHARON SMITH; CHARLES MAUK; AND JAMES E. CAMPBELL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals overlooks evidence presented demonstrating that Defendant Pennington was aware of the economic status of Elliott County when the Fiscal Court acted to eliminate county positions.

Whether the decision of the Court of Appeals overlooks evidence presented to the District Court demonstrating that as a matter of law the County Judge Executive does not possess the authority to abolish positions.

Whether the decision of the Court of Appeals in allowing bare statements and allegations of parties with no supporting evidence to defeat a properly supported motion for summary judgment creates a burden that county governments cannot meet.

PARTIES TO THE PROCEEDING

Petitioners

The Petitioners are Charles Pennington, Individually and in his official capacity as Elliott County Judge Executive and Elliott County Fiscal Court.

Respondents

The Respondents are Lena Helwig; Roy Spears; Jennifer L. Gilliam, Administratrix of the estate of Jamie Gilliam; James E. Frazier; Burl Carter; Debbie Wagoner; Sharon Smith; Charles Mauk; and James E. Campbell.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit entered an Order denying the petitioners' Petition for Rehearing on May 2, 2002 (Case No. 00-6381). This Order may be found at page 1a of this Petition.

The United States Court of Appeals for the Sixth Circuit filed its Opinion in this case on February 22, 2002 (Case No. 00-6381). The Opinion may be found at pages 3a-14a of this Petition.

The United States District Court for Eastern Kentucky at Ashland entered a summary judgment for the Petitioners on September 27, 2000 (Case No. 99-00017). This judgment may be found at page 15a of this Petition.

The Magistrate Judge's Report and Recommendation in favor of granting summary judgment was entered April 28, 2000. The Report and Recommendations may be found at page 29a of this Petition.

None of the opinions of the Courts below were published in any official reporter.

JURISDICTION OF THE COURT

The Order (Opinion) sought to be reviewed was entered on February 22, 2002. The Court of Appeals entered an order denying a timely Petition for Rehearing *en Banc* on May 2, 2002. (App. A at 1a).

The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

(a) 42 U.S.C.§ 1983

(b) Kentucky Revised Statute 64.530

(c) Kentucky Revised Statute 67.083

STATEMENT OF THE CASE

All but one of the respondents are former employees of the Elliott County Fiscal Court who allege that newly appointed County Judge Executive Charles Pennington and the Fiscal Court discharged them from their respective county jobs, in violation of 42 U.S.C. § 1983 and their First Amendment rights of free speech and association for supporting petitioner Pennington's political rivals. *See* Opinion at page 4a. On January 4, 1999, the petitioners abolished the positions held by respondents, Lena Helwig (road department secretary), James E. Frazier (police officer), and Sharon Smith (janitor). A county-wide pay cut was initiated also at this time. Respondents, Roy Spears, James Gilliam, Burl Carter, Charles Mauk, and James E. Campbell, (all road department employees) claimed the pay-cut was tantamount to a constructive discharge. After refusing to accept the pay cut, respondents Spears, Gilliam, Carter, Mauk, and Campbell received notice from Pennington stating: "After our discussion of budget cuts on January 04, 1999, you're [sic] employment is now terminated." Plaintiff Debbie

Wagoner (county treasurer) accepted the pay cut and still works for the county ambulance service. The respondents contend that these actions were primarily motivated by the fact that they supported Pennington's political rivals and they challenge the petitioners' actions as violating their First Amendment rights. Petitioner Pennington and the Elliott County Fiscal Court contend that the employment decisions were motivated by an assessment of the county's dire financial condition and the necessity for an across-the-board reduction of the Elliott County payroll, in an attempt to ensure compliance with the financial-budgetary requirements of Kentucky law. *Id.*

On February 22, 2002, the Sixth Circuit Court of Appeals entered its opinion reversing the district court's grant of summary judgment as to respondents, Helwig, Frazier, and Smith, and remanding this case for further proceedings. On May 2, 2002, the court denied the petition for rehearing en banc. The district court concluded in the underlying opinion that "the defendants had proven by a preponderance of the evidence that the employment decisions at issue would have been the same absent the protected conduct," and that the plaintiffs did not provide countervailing evidence that "members of the Fiscal Court retaliated against them because of their political associations." In part, the Sixth Circuit disagreed. *See* Opinion, page 13a. The Sixth Circuit's opinion stated, "Essentially, we see the defendants' post-hoc construction of the county's economic status as it existed on January 4, 1999, as transforming the question of motivation into one of objective reasonableness. Even assuming this objective evidence to be credible, we conclude that it does not resolve whether Pennington would have made the same decisions absent the plaintiffs' political affiliation. Pennington's defense is the county's dire economic status." *Id.* A panel of the court found, "His proof, in our estimation,

does not address whether he knew that status when he made the employment decisions." *Id.* In viewing the evidence in a light most favorable to the nonmoving party, the Sixth Circuit concluded that the defendants had not met their burden as to the discharged plaintiffs, Helwig, Frazier, and Smith, sufficiently to show that there are no genuine issues in dispute. The court therefore reversed the district court's grant of summary judgment as to those plaintiffs. *Id.*

In discussing whether Judge Pennington knew of the economic status when he made the employment decisions, the Sixth Circuit failed to address evidence presented establishing, (1) that Pennington was aware of the economic status of the county and, (2) that as a matter of law the county judge executive does not possess the authority to abolish positions.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit entered its opinion reversing the district court's grant of a summary judgment as to plaintiffs, Helwig, Frazier, and Smith, based upon a lack of proof as to whether Pennington knew the economic status of the county when he made the employment decisions. In reversing, the Sixth Circuit overlooked evidence presented to the district court and the appellate court demonstrating that Pennington was aware of the economic status of Elliott County when the Fiscal Court acted to eliminate the county's positions. The Sixth Circuit's opinion similarly overlooks evidence presented demonstrating that as a matter of law the county judge executive does not possess the authority under Kentucky law to abolish positions. Further, allowing bare statements and allegations of parties or the mere existence of a scintilla of evidence without supporting evidence to defeat a properly supported motion for summary judgment places local governments with an almost impossible burden in meeting the

requirement that they demonstrate by a preponderance of the evidence that the same employment decision would have been made, thus forcing to trial the majority of cases alleging First Amendment claims of political retaliation, as well as any other discrimination claims.

A. The Opinion Overlooks Evidence Presented To The District Court And The Sixth Circuit Demostrating That Pennington Was Aware Of The Economic Status Of Elliott County When The Fiscal Court Acted To Eliminate County Positions.

Elliott County Sheriff Charles Pennington was one of several candidates to run for County Judge Executive in the May 1998 Democratic Primary. Pennington had served a nine-year term as sheriff. Outgoing County Judge Executive David Blair let it be known that if Pennington defeated political rival Kazee in the Democratic Primary that he would devote himself during the remainder of his term to destroying the financial integrity of Elliott County so that the judge elect and the incoming Fiscal Court would be unable to successfully operate county government. Blair, for instance, told former Elliott County School Superintendent Curt Davis that if Charles Pennington defeated Kazee in the May Primary Election, that he, Blair, would see to it that the county would be broke when Pennington took office and would be unable to even buy a postage stamp (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Curt Davis Affidavit at Appendix 2, Apx. page 20). According to Mr. Davis, David Blair told him that he would not even leave so much as a band-aid in the county operated ambulance service *(Id.)*. The evidence presented to the district court demonstrated that Mr. Davis had told Judge Pennington of

this plan. (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Charles Pennington Affidavit attached thereto at Appendix 1).

On election eve, outgoing Judge Executive David Blair held a meeting at his home in order to lay plans to spend all the money he could in order to undermine the incoming administration. Blair spoke to Magistrate Lavona Binion by telephone on election eve. Ms. Binion had been defeated in her bid for re-election to a magistrate's seat. Mr. Blair invited Ms. Binion to his home in order to plot the financial destruction of the county (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Lavona Binion Affidavit attached thereto at Appendix 3, Apx. page 21; R. 38, Notice by Defendants of Filing Original Affidavit of Lavona Binion Cox, Apx. page 58). Binion, who refused to participate in this conspiracy, advised Mr. Pennington of Blair's plan and resigned her office as a magistrate on the Elliott County Fiscal Court the following day. (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Charles Pennington Affidavit attached thereto at Appendix 1, and Lavona Binion Affidavit attached thereto at Appendix 3, Apx. page 21; R. 38, Notice by Defendants of Filing Original Affidavit of Lavona Binion Cox, Apx. page 58).

During the month of July 1998, Blair, who did not seek re-election, and the Fiscal Court began implementation of the plan. They added county employees, including at least two of the plaintiffs in this lawsuit, and granted pay raises to all county employees (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Minutes of Fiscal Court for July 8, 1998 attached to Fonda Weddington Affidavit at Appendix 4, Apx. page 21).

Plaintiff, Debbie Wagoner, resigned her post as County Treasurer four days before the new administration took office and submitted her letter of resignation on December 28, 1998 (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Letter of Resignation at Appendix 5, Apx. page 21). Ms. Wagoner left the books and financial records of Elliott County government in such a state of confusion and disarray as to render them utterly useless to the incoming Fiscal Court.

The defendant, Charles Pennington, took office as Elliott County Judge Executive on January 1, 1999 (R. 24, Pennington Deposition, pg. 12, Apx. page 220). On that date, he gained access to the county's financial records and on January 2nd obtained the bank statements (R. 24, Pennington Deposition, pages 12, 13, Apx. pages 220-221). His review of the records revealed that one bank account had $0.04 (four cents) in it and another, the LGEA account, had been overdrawn by $2,900.00 (R. 24, Pennington Deposition, page 14, Apx. page 222). The Sixth Circuit took notice of the testimony of Debbie Wagoner that Pennington did not have access to the county's ledger sheets when decisions were made. *See* Sixth Circuit Opinion at Appendix page 11a. Notwithstanding, the proof presented by Appellees demonstrated that access to other records was gained, including, as mentioned above, bank statements and other financial records.

Proof presented showed that gas tanks used to heat county offices and buildings were empty or close to being empty, including the ambulance service, fire department, library, PVA office and county garage. *See* Brief for Appellees at page 7. The PVA office and public library had closed down before the first of the year because of a lack of money for heat. (*Id.*). The fuel tank at the ambulance service

had fuel for no more than a couple of hours. There was not even a band-aid in the supply room at the ambulance service. None of the county's four ambulances were equipped with snow tires and the county was required to purchase and install snow tires on each of those units. One of the ambulances were frozen up and would not start. (*Id.*).

At the county road department only one piece of equipment, a backhoe, was operable. The trucks and other pieces of equipment would not run. (*Id.*). All of the tools had disappeared from the county garage. There was not one gallon of diesel fuel, not one gallon of gasoline, not one quart of oil, and not one load of gravel or one piece of pipe or tile at the county garage. There was no salt to use on county roads even if the county could somehow find a truck that it could place in operation. (R. 24, Pennington Deposition, pg. 31, Apx. page 228). Immediate cash outlay was needed to repair county vehicles, equipment and machinery and to replace all of the tools taken from the county garage, purchase gravel, salt, drain tile, pipe and related materials needed to operate the county road department, ambulance repair, tire purchases and medical supplies required for the ambulance service.

At its meeting on January 4, 1999, the Elliott County Fiscal Court voted unanimously to abolish the positions in question. (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Minutes of Fiscal Court meeting of January 4, 1999 attached to Fonda Weddington Affidavit at Appendix 4, Apx. page 25). Judge Pennington had met with employees earlier that day to discuss pay cuts that would be levied across the board. *See* Sixth Circuit opinion at appendix page 5a. The Sixth Circuit opinion found without basis that "the defendants promptly abolished the positions held by plaintiffs, Lena Helwig, James E. Frazier, and Sharon

Smith". *See* appendix page 5a. The Sixth Circuit's opinion further found that "within one week of Pennington's swearing-in he initiated a county wide pay cut for plaintiffs" *Id.* at 5a. The proof presented in this case, as well as the Sixth Circuit's opinion, demonstrates that as of January 4, 1999, petitioners had sufficient information to discuss the economic status of the county with its employees and to take action to levy an across the board pay cut. *See* Opinion at page 5a. Contrary to the Sixth Circuit's opinion, the evidence presented demonstrated that the Elliott County Fiscal Court did not act to abolish the positions in question until January 4, 1999, the same date the meeting was held to discuss across the board pay-cuts.

The county's financial records, including the pile of unpaid bills dating back six months, together with the requirements of paying for an ambulance which had been ordered without funds to pay for it, making the county's payroll bi-monthly and the necessity of allocating expenditures to make both the ambulance service and the road department operational, presented a desolate picture of the state of the county's finances. The proof presented by the petitioners demonstrated that the incoming administration was more than justified in believing that there was a financial crisis in Elliott County as of January 1, 1999. As presented in the Brief for Appellees, the financial condition of the county was not a secret. This is a small community. The testimony provided demonstrated that many in the community, including then Sheriff Pennington, were well aware of the county's dire financial condition.

The Magistrate Judge concluded that the petitioners had proven by a preponderance of the evidence that the employment decisions would have been the same absent the protected conduct. "They have submitted numerous

documents which support their argument that the county was in poor financial shape when Pennington's administration took over. Blair's administration had left approximately $85,000 in unpaid bills from 1998. The county had ordered an ambulance for $55,000 and received a grant of $23,000 to pay for it, but the grant was never applied to the balance, so the entire balance was still due and owing. Bank statements and/or financial statements show that one account had a negative balance and another had only 4¢ in it. Gas tanks used to heat county offices were left empty, the ambulance service and the road departments were all but in-operable, county agencies had to close because of lack of heat–all evidence that the county's finances were in very poor shape when Pennington took office." *See* Report and Recommendation, at page 45a. The Magistrate Judge in a footnote on pg. 45a stated, "The conditions of the ambulance service and road departments were particularly troubling. None of the ambulances had snow tires on them. There was only enough fuel for a few hours' of service. One of the ambulances would not run at all. The supply room was empty. The only operable piece of equipment in the road department was a backhoe. All of the tools had 'disappeared' from the garage, and there was no diesel fuel or gasoline or salt in case of an emergency. As a result, it appears that at least two major County services were completely unavailable to the citizens of Elliott County." *See* Footnote 9, Report and Recommendation, at page 45a.

In the district court's order dated September 27, 2000, Judge Wilhoit describes the financial condition of Elliott County when Pennington took office as including:

> Pennington had turned over the $125,000 in tax monies prior to year-end, in accordance with a court order.

Approximately $85,000 in unpaid bills were outstanding. Some of these were over six months old.

The ambulance service was not functional. The supply room was empty and the ambulances did not have snow tires on them. One ambulance did not run at all and the other only had enough fuel to operate for a few hours. A former employee testified that he had been told that there was no money for the ambulance service and to drive the ambulances until they did not run and then park them.

The county garage was not operational. It had almost nothing in it - no supplies, no diesel fuel, no pipe, no salt, no equipment parts, little fuel for heat, no tools at all - and only had one operable piece of equipment, a backhoe. The County Judge's car had sand in the radiator and water pump and other items were in need of repair or were inoperable.

The county library had been closed for lack of heat and had numerous problems. During Blair's administration, the board had to purchase a new furnace when the county could not provide the funds. However, the county did not have the funds to provide fuel for the new furnace, so it still did not have heat. There was also no fuel for the PVA office, which also was closed toward the end of the Blair administration.

> County payroll from the Blair administration was approximately $74,000 per month.

See District Court Order, at pages 24a-25a. The district court found that all of the above was substantiated by documents and/or affidavits, mostly from third parties. *Id.* at 26a.

Proof was presented to the Sixth Circuit demonstrating that Judge Pennington was well aware of the economic status of Elliott County when the Fiscal Court acted to eliminate county positions. Elliott County and its county seat of Sandy Hook are very small communities. The Sixth Circuit took issue with Former County Treasurer Wagoner's testimony that Pennington did not have access to the county's economic ledger sheets. *See* Opinion at 11a. This proof did not address access to other financial records, including bank statements and unpaid bills.

B. The Opinion Overlooks Evidence Presented To The District Court And Appellate Court Demonstrating That As A Matter Of Law The County Judge Executive Does Not Possess The Authority To Abolish Positions.

As presented to the district court and the Sixth Circuit, County Judge Executive Pennington did not have the power to create, abolish, or set salaries. *See* Brief of Appellees at page 34. This power is vested solely in the Elliott County Fiscal Court. The respondents did not allege by proof that their First Amendment rights were discriminated against by the Fiscal Court or any other individual member, rather, respondents claim that their positions were abolished or salaries reduced by County Judge Executive Pennington.

County Judge Executive Pennington did not have any power under Kentucky law to fix the compensation of county employees nor to abolish positions that statutorily are under the control of the Fiscal Court. The Fiscal Court took actions deemed proper given the financial state of Elliott County, not Judge Pennington. (R. 36, Memorandum Brief in Support of Motion for Summary Judgment, Minutes of Fiscal Court meeting of January 4, 1999 attached to Fonda Weddington Affidavit at Appendix 4, Apx. page 25). *See* KRS 64.530 and KRS 67.083. Under the rationale of *Christian*, Pennington cannot be held liable since he did not first possess power by virtue of state law and should be dismissed from this suit. *Christian v. Belcher*, 888 F.2d 410, 414 (6th Cir.1989).

The Magistrate Judge, in his Report and Recommendation, found that the respondents had not come forth with any evidence of retaliation as against any of the members of the Fiscal Court, only Pennington. *See* Report and Recommendation, at page 47a. Based upon the Magistrate Judge's conclusion, the petitioners had proven by a preponderance of the evidence that the employment decisions – regardless of whether they were made by the Fiscal Court or Pennington – would have been made absent the protected conduct, the Magistrate Judge found that the respondents could not prevail on their 1983 claims against Pennington, either in his official or individual capacity. The Magistrate Judge found that the respondents must still prove their retaliation case against Pennington, but that the evidence in this case, all of which is directed at Pennington, was insufficient to support a verdict in their favor. *See* Report and Recommendations, at page 47a.

The district court's order found that the evidence provided by plaintiffs in support of their prima facie case was directed toward Pennington. They did not provide any

evidence for their claim that the members of the Fiscal Court retaliated against them because of their political associations. *See* District Court Order, at page 26a. The decision to abolish the positions in question was made by the Fiscal Court, not Pennington. As a matter of law, the county judge executive does not possess the authority to abolish positions. The Sixth Circuit's opinion failed to address this issue prior to reversing. *See* Sixth Circuit Opinion at page 13a.

C. The Decision Of The Court Of Appeals In Allowing Bare Statements And Allegations Of Parties With No Supporting Evidence To Defeat A Properly Supported Motion For Summary Judgment Creates A Burden That Local Governments Cannot Meet.

In *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S.274 (1977), this Court set out the *prima facie* case for a political retaliation cause of action. The plaintiffs must show (1) that their conduct was constitutionally protected; and (2) that such conduct was a substantial or motivating factor in the defendants' decision to take adverse action with respect to their employment. As recently noted by the Sixth Circuit,

> "this analysis focuses on whether the adverse employment action was motivated in substantial part by the plaintiff's constitutionally protected activity. . . If the plaintiff meets her burden, the burden then shifts to the defendants to prove by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct."

Sowards v. Loudon County, 203 F.3d 426, 431 (6th Cir. 2000). A preponderance of the evidence has been defined by this Court as that proof which leads the fact finder to conclude "that the existence of a fact is more probable than its nonexistence."*Disner v. Westinghouse Elec. Corp.*, 726 F.2d 1106, 1108 6th Cir.(Mich.) citing *In re Winship*, 397 U.S. 358, 371, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring), quoting F. James, Civil Procedure 250-251 (1965). A preponderance of the evidence has also been defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c)(2)(1999).

In a series of decisions commonly referred to as the "trilogy," *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986), this Court emphasized that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. In short, the "trilogy" requires the nonmoving party to produce specific factual evidence that a genuine issue of material fact exists.

The United States Court of Appeals for the Sixth Circuit has interpreted the "trilogy" to mean that the nonmoving party must produce enough evidence, after having had a reasonable opportunity to conduct discovery, so as to withstand a directed verdict motion. *Street v. J.C. Bradford & Co.* 886 F.2d 1472, 1477 (6th Cir. 1989).

In the current case, the Sixth Circuit has created a burden that local governmental agencies cannot meet.

Allowing bare statements and allegations of parties or the mere existence of a scintilla of evidence without supporting evidence to defeat a properly supported motion for summary judgment places local governments with an almost impossible burden in meeting the requirement that they demonstrate by a preponderance of the evidence that the same employment decision would have been made, thus forcing to trial the majority of cases alleging First Amendment claims of political retaliation, as well as other discrimination claims.

CONCLUSION

For these reasons, petitioners request that the Court grant the petition for writ of certiorari.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed May 2, 2002]

No. 00-6381

LENA HELWIG, et al
Plaintiffs-Appellants,

v.

CHARLES PENNINGTON,
Individually and in his official capacity
as Elliott County Judge Executive, et al,
Defendants-Appellees.

JUDGES:
RYAN, BOGGS, and DAUGHTREY, Circuit Judges

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed February 22, 2002]

No. 00-6381

LENA HELWIG; ROY SPEARS;
JENNIFER L. GILLIAM, Administrator
of the estate of Jamie Gilliam;
JAMES E. FRAZIER; BURL CARTER;
DEBBIE WAGONER; SHARON SMITH;
SHARON SMITH; CHARLES MAUK;
JAMES E. CAMPBELL,
Plaintiffs-Appellants,

v.

CHARLES PENNINGTON,
Individually and in his official capacity
as Elliott County Judge Executive;
ELLIOTT COUNTY FISCAL COURT,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BEFORE:
RYAN, BOGGS, and DAUGHTREY, Circuit Judges.

OPINION

RYAN, Circuit Judge. All but one of the plaintiffs are former employees of the Elliott County Fiscal Court who allege that newly appointed county judge executive Charles Pennington and the Fiscal Court discharged them from their respective county jobs, in violation of 42 U.S.C. § 1983 and their First Amendment rights of free speech and association for supporting Pennington's political rivals. Plaintiff Debbie Wagoner is still employed by the county, but was forced to assume a county-wide pay cut which she claims effectuated a constructive discharge. The plaintiffs contend that the district court should not have granted summary judgment for the defendants because there are material questions of fact as to whether the actions taken by the defendants were politically motivated. We agree that the defendants did not carry their burden as required by *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S.Ct. 568 (1977), as to plaintiffs Helwig, Frazier, and Smith and conclude that material issues remain. We will therefore reverse the grant of summary judgment as to those plaintiffs and remand for further proceedings. We will affirm the court's grant of summary judgment with respect to the claims of the remaining plaintiffs.

I.

This case illustrates the unfortunate and, we are told, frequent change-of-the-guard wranglings that occur when a longtime elected Kentucky county judge executive decides to retire. Outgoing judge executive, David Blair, employed all of the plaintiffs who, in turn, supported defendant Charles

Pennington's political rival Mark Kazee in his unsuccessful bid for county judge executive. Pennington, then county sheriff, defeated opponent Kazee in the May 1998 Democratic primary for the county judge executive position. Pennington was subsequently elected to the position in the November 1998 general election.

On taking office, the defendants promptly abolished the positions held by plaintiffs Lena Helwig (road department secretary), James E. Frazier (police officer), and Sharon Smith (janitor). Within one week of Pennington's swearing-in he initiated a county-wide pay cut that plaintiffs Roy Spears, James Gilliam, Burl Carter, Charles Mauk, and James E. Campbell (all road department employees) claim was tantamount to a constructive discharge. After refusing to accept the pay cut, plaintiffs Spears, Gilliam, Carter, Mauk, and Campbell received notice from Pennington stating: "After our discussion of budget cuts on January 04, 1999, you're [sic] employment is now terminated." Plaintiff Debbie Wagoner (county treasurer) accepted the pay cut and still works for the county ambulance service. The plaintiffs contend that these actions were primarily motivated by the fact that they supported Pennington's political rivals and they challenge the defendants' actions as violating their First Amendment rights. Pennington contends that the employment decisions were motivated by his assessment of the county's dire financial condition and the necessity for an across-the-board reduction of the Elliott County payroll, in an attempt to ensure compliance with the financial-budgetary requirements of Kentucky law.

The defendants' motion for summary judgment was initially referred to United States Magistrate Judge James B.

Todd, who recommended it be granted. Following timely objections, the district court adopted the magistrate judge's recommendation and granted the defendants' motion for summary judgment. The court concluded that the defendants had proven by a preponderance of the evidence that the employment decisions would have been the same absent the protected conduct and that the plaintiffs had not provided any countervailing evidence of unconstitutional retaliation. Without lengthy discussion, the court also concluded that while the defendants' motion did not ask for a dismissal of the claim against Pennington in his individual capacity, the evidence against Pennington in his individual capacity would be the same as the evidence against him in his official capacity. Because the court determined that the evidence was insufficient to maintain a claim against Pennington or the Fiscal Court officially, the court summarily dismissed all of the plaintiffs' federal claims.

II.

A.

We review an order granting summary judgment *de novo*. *Hall v. Tollett,* 128 F.3d 418, 421 (6th Cir. 1997). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

Because plaintiffs, in cases in which a defendant's state of mind, such as motive, is in issue, must primarily rely on circumstantial evidence and reasonable inferences drawn

from the defendant's conduct, we have frequently held that summary judgment is inappropriate. *Wilson v. Seiter,* 893 F.2d 861, 866 (6th Cir. 1990), vacated on other grounds, 501 U.S. 294 (1991). Summary judgment is usually appropriate in state-of-mind cases only if the nonmoving party "'rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" *Picha v. City of Parma,* 1992 U.S. App. LEXIS 6291, No. 91-3501, 1992 WL 57419, at 2 (6th Cir. Mar. 25, 1992) (unpublished disposition) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990)).

B.

The plaintiffs contend that they were discharged, directly and constructively, from their respective county positions for exercising their protected First Amendment rights, in violation of 42 U.S.C. § 1983. Essentially, therefore, this case is about the underlying motivations of the defendants' employment decisions. To establish an unconstitutional retaliation claim, this court requires that the plaintiffs prove: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two--that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X v. Blatter,* 175 F.3d 378, 394 (6th Cir. 1999) (*en banc*). This inquiry tracks the Supreme Court's analysis in *Mt. Healthy City School District,* 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568, where the Court held that a plaintiff claiming retaliation for constitutionally protected speech must show that the exercise

of his First Amendment rights was a "substantial" or "motivating" factor in the employment decision. *Id.* at 287. If the plaintiff meets this burden, the burden of proof then shifts to the defendant to prove by a preponderance of the evidence that the same employment decision would have been made absent the protected conduct. *Id.* Contrary to what the defendants have told us, the burden-shifting analysis from Title VII cases does not apply. *Sowards v. Loudon County, Tennessee,* 203 F.3d 426, 431 n.1 (6th Cir.) (citing *Barrett v. Harrington,* 130 F.3d 246, 262 (6th Cir. 1997)), *cert. denied,* 531 U.S. 875 (2000). In other words, if the defendants meet their burden, the burden does not then shift back to the plaintiffs to prove pretext.

Upon adopting the magistrate judge's report and recommendation, the district court did not affirmatively rule on whether the plaintiffs had met their initial burden; therefore, we will begin by considering whether the plaintiffs made a sufficient *prima facie* showing as required by *Thaddeus-X,* 175 F.3d at 394.

1. Protected Conduct

The plaintiffs claim they were exercising their constitutional right of political association protected by the First Amendment by supporting Pennington's rival, Kazee. This court recognizes that the right of political association is a "well established right," because "political belief and association constitute the core of those activities protected by the First Amendment." *Sowards,* 203 F.3d at 432 (internal quotation marks and citations omitted). Supporting a political candidate clearly falls within the scope of political association intended by the First Amendment. *Id.* Therefore, the

plaintiffs' support of Pennington's political rival, Kazee, was a constitutionally protected activity.

2. Adverse Action

The second inquiry focuses on whether the plaintiffs have shown that they have suffered an adverse action by the defendants that would likely "chill a person of ordinary firmness" from continuing in the constitutionally protected conduct. *Sowards,* 203 F.3d at 433. Here, the plaintiffs were discharged and/or demoted from their respective county positions or suffered pay cuts. These qualify as adverse employment actions. *Id.*

3. Causal Connection

Finally, the plaintiffs must show that the exercise of their First Amendment rights was a "substantial" or "motivating" factor in the employment decision. The plaintiffs must tender enough evidence so that a reasonable juror could conclude that the employment decisions were substantially motivated by their constitutionally protected associational rights. In proving their case, the plaintiffs may rely on circumstantial evidence that their political activities caused the adverse employment decisions. *Conklin v. Lovely,* 834 F.2d 543, 546-47 (6th Cir. 1987). We conclude that the following evidence, if accepted by a jury, could support the plaintiffs' claim of unconstitutional dismissal: (1) the defendants' retaliatory statements; (2) Pennington supporters received jobs in the new administration;(3) counter-evidence of when Pennington gained access to the financial records; and (4) counter-evidence that financial condition was not dire when Pennington made the employment decisions.

First, the plaintiffs presented evidence that the defendants made numerous retaliatory statements vowing political revenge that tended to show political motivation. Former county treasurer Wagoner testified that Pennington stated two days before assuming office that he could "get rid of us all" and that "he had a whole sack full" of job titles to justify his actions. Wagoner characterized these comments as vengeful and claims they were targeted at those most politically active against Pennington. Former plaintiff Deborah Nickles testified that Pennington threatened to "fire anyone he wanted" because he could "bring somebody else in on a different title cause he had a sack full of titles." Nickles also testified that Pennington's son, Charles Ray Pennington, told witness Tommy Boggs "that dad is going to get rid of everybody that worked for David [Blair] before it is all done." Helwig testified that Fiscal Court Magistrate Diane Penix told her that she "would be looking for another job." Further, Helwig testified that Fiscal Court Magistrate Billy Ray Wilson stated, "'I didn't have anything to do with you all losing your jobs, that was all done and said before we took office.'" Wilson, however, later disavowed this statement in an affidavit. Finally, Frazier testified that Fiscal Court Magistrate Gary Porter told him that "[his] job may be in crisis" if he supported Kazee in the election. The defendants urge us to not consider these statements because they come from interested plaintiffs; however, it is not our role, nor is it the role of the district court when ruling on summary judgment to make credibility determinations--credibility questions are properly left for a jury. This is especially true in state-of-mind cases where evidence of motive is particularly difficult to prove, and the plaintiffs must rely primarily on circumstantial evidence.

Second, the plaintiffs presented evidence that four Pennington supporters received positions in the new administration after the plaintiffs were discharged, suggesting that Pennington was motivated by political factors instead of the suggested economic rationale. Pennington claims that the county's financial crisis necessitated a streamlined county staff and, as a result, the elimination of certain county positions. The plaintiffs offered evidence, however, of at least four Pennington supporters who were offered new jobs in the administration. Further, the plaintiffs offered evidence that Pennington's decision to eliminate Frazier's position as a police officer, in fact, cost the county money as it was no longer able to take advantage of a federal "Cops grant" which served to subsidize Frazier's salary.

The plaintiffs also offered evidence that Pennington did not have access to the county's financial records when he made the employment decisions and consequently could not have had an economic justification for his adverse job actions. Former county treasurer Wagoner testified that Pennington did not have access to the county's economic ledger sheets when he made the employment decisions on January 4, 1999. Instead, claimed Wagoner, Pennington did not request access to these sheets until January 12, 1999. Also, Nickles testified that Pennington distanced himself from the county finances, and therefore, could not know whether the county was in dire financial condition when he made the employment decisions.

Finally, the plaintiffs offered the following evidence tending to controvert the defendants' position that the county was in a financial crisis: (1) testimony of Blair, outgoing judge executive, who stated that based on his 25-year knowledge of the county's finances, no economic justification

existed for the job actions taken; and (2) testimony of Wagoner, former county treasurer, who testified that certain monies, namely the $125,000 in amassed taxes and the FEMA monies, were not considered in the defendants' economic calculus, thereby skewing the actual financial condition of the county.

We find that a reasonable juror could conclude from the plaintiffs' evidence that the employment decisions were substantially motivated by their constitutionally protected associational rights. Therefore, the burden shifts to the defendants to prove by a preponderance of the evidence that the same employment decisions would have been made absent the protected conduct.

The defendants offered objective, economic evidence of the county's dire financial condition as justification that the same employment decisions would have been made absent the protected conduct. With respect to the economic condition of the county, the defendants offered and the district court considered the following evidence: (1) testimony that Pennington had turned over the $125,000 in amassed taxes before the end of 1998 as required by the court order; (2) testimony that the county received only $134,927 of the originally requested and anticipated $181,000 in FEMA funds; (3) testimony that the county had more than $80,000 in unpaid bills and a $265,000 road fund debt; (4) testimony that the county had a reported payroll in excess of $74,000 and an inoperable road department, ambulance service, and county garage; (5) testimony of local government officials who corroborated Pennington's testimony that the county was in debt when he assumed office; and (6) the report completed by the State Auditors Office that concluded: (a) the former

administration expended more than 65% of the budget, overspending approximately $220,035.95 by December 31, 1998; and (b) the county did not pay all of its bills in the first half of the fiscal year (July-December 1998), leaving $254,834.65 to be paid by the current administration.

The district court concluded that "the defendants had proven by a preponderance of the evidence that the employment decisions at issue would have been the same absent the protected conduct," and that the plaintiffs did not provide countervailing evidence that "members of the Fiscal Court retaliated against them because of their political associations." In part, we disagree. Essentially, we see the defendants' post-hoc construction of the county's economic status as it existed on January 4, 1999, as transforming the question of motivation into one of objective reasonableness. Even assuming this objective evidence to be credible, we conclude that it does not resolve whether Pennington would have made the same decisions absent the plaintiffs' political affiliation. Pennington's defense is the county's dire economic status. His proof, in our estimation, does not address whether he knew that status when he made the employment decisions. Viewing the evidence in a light most favorable to the nonmoving party, we conclude that the defendants did not meet their burden as to the discharged plaintiffs Helwig, Frazier, and Smith sufficiently to show that there are no genuine issues in dispute. We, therefore, reverse the district court's grant of summary judgment as to those plaintiffs.

We conclude, however, that no material issues remain as to whether the county-wide pay cut with respect to road department employees Spears, Gilliam, Carter, Mauk, and Campbell, and former county treasurer Wagoner, would have

been the same absent their political affiliations. The defendants presented unrefuted evidence that the pay cut was an across-the-board measure applicable to all county employees, both carryover employees and new hires alike, including the four new hires. In fact, plaintiff Wagoner conceded in her testimony that all employees in the new administration had to assume the cuts. Similarly, all county employees received two $2,000 pay raises in March and July of 1999, respectively. Against this showing of evenhanded salary reductions and increases, the plaintiffs did not present any evidence of disparate treatment, except to the extent that they were the only employees who declined the pay cut, and as a consequence lost their jobs. This, of course, they had a right to do. However, had the plaintiffs accepted the pay cut, nothing in the record indicates that they would have been discharged or that they would not have received the later incremental pay raises. The plaintiffs would have us conclude that the pay cut, while applying to all county employees, specifically targeted them because of their political affiliation. We refuse to accept this tenuous supposition and simply conclude that such improbable inferences of unconstitutional motive, without more, cannot survive a motion for summary judgment.

III.

With respect to plaintiffs Spears, Gilliam, Carter, Mauk, Campbell, and Wagoner, we **AFFIRM** the judgment of the district court. For the reasons discussed above, we **REVERSE** the district court's grant of summary judgment as to plaintiffs Helwig, Frazier, and Smith and **REMAND** the case for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

[Filed September 27, 2000]

Civil Action No. 99-17

LENA HELWIG, et al.,
Plaintiffs,
v.

CHARLES PENNINGTON, et al.,
Defendants.

ORDER

This matter is before the Court upon the defendants' motion for summary judgment [Record No. 36]. This matter was referred to the Honorable James B. Todd, United States Magistrate Judge, for a report and recommendation [Record No. 44], to which the plaintiffs have filed objections and the defendants have replied. The parties have also filed supplemental pleadings in further support of their respective positions.

I. REPORT & RECOMMENDATION

The facts and positions of the parties are set forth in sufficient detail in the Magistrate Judge's report and recommendation and will not be recounted here.

In his report and recommendation, Magistrate Judge Todd considered the plaintiffs arguments and/or evidence, which was as follows: (1) evidence that Pennington and his family members had made certain statements indicating he would "clean house" when he took office as County Judge Executive of Elliot County; (2) the financial condition of the county could not have been a motivating factor in the decisions made regarding the plaintiffs' employment because Pennington held $125,000 in tax monies and the county had applied for a $181,000 FEMA grant; and (3) Pennington now employs more employees than the administration of former County Judge Executive David Blair did.

Regarding item number 2, Magistrate Judge Todd concluded that the plaintiffs offered nothing in support of this argument other than deposition testimony of plaintiff Debbie Wagoner and former County Judge Executive David Blair - no documentary evidence was provided, only argument. The plaintiffs also do not refute the evidence provided by Pennington that he had, in fact, turned over the $125,000 before the end of the year. As to item number 3, this is completely unsubstantiated, per the Magistrate Judge. The only evidence of any political motivation was the statements made by Pennington. Magistrate Judge Todd questions whether the plaintiffs can even make out one element of their prima, facie case - that their political affiliation was a substantial or motivating factor - with th/s evidence alone, in

light of opposing evidence.

However, assuming this is sufficient, Magistrate Judge Todd concludes that the defendants have proven by a preponderance of the evidence that the employment decisions would have been the same absent the protected conduct, which is the test in the Sixth Circuit. He bases this conclusion on the numerous documents and affidavits that support the defendants' assessment of the financial situation in Elliott County. Specifically, Magistrate Judge Todd noted the following:

> Blair's administration had left approximately $85,000 in unpaid bills from 1998. The county had ordered an ambulance for $53,000 and received a grant of $23,000 to pay for it, but the grant was never applied to the balance, so the entire balance was still due and owing. Bank statements and/or financial statements show that one account had a negative balance and another had only 4¢ in it. Gas tanks used to heat county offices were left empty, the ambulance service and road departments were all but inoperable, county agencies had to close because of lack of heat - all evidence that the county's finances were in very poor shape when Pennington took office.
>
> Joe Morris and Lonnie Campbell of the Department for Local Government both testified by affidavit that they were unable to obtain sufficient financial information to fully assess the county's financial condition in

January of 1999 and once the year-end numbers were finally obtained, they contained numerous discrepancies and inaccuracies. They advised Pennington to pay the past due bills while at the same time clearing up any negative balance, requiting Pennington to increase county revenues and/or decrease county services and reduce all non-mandated expenses. Also, the Blair administration had failed to provide sufficient documentation for a FEMA grant of $181,000, which required the Pennington administration to file a new application. Because they could not justify the $181,000, the county ultimately received only $135,000 from FEMA. The county obtained an emergency grant of at least $35,000 and two dump trucks for its road department. There is further unrefuted evidence that the positions that were abolished were abolished for financial and not political reasons.

The defendants have also submitted the affidavits of two non-party witnesses, Curt Davis and Lavona Binion Cox, who state that Blair told them in so many words that it was his goal to leave the county in a poor financial condition at the end of his administration. This further supports their position that the county's finances were, in fact, in such condition.

Report & Recommendation at pp. 13-15 (footnote omitted).

Judge Todd also notes that, in response, the plaintiffs did not offer any evidence, but only argument. They did not contest that the salary reductions were made across the board. Based upon this, he recommended that the motion for summary judgment be granted and that the claims be dismissed against all parties.[1] Since this would dispose of all of the federal claims, he then recommended that the state law claims be dismissed without prejudice.

II. THE PARTIES' RESPONSES

In their objections, the plaintiffs argue that there is a fact question as to whether the actions taken by the defendants were politically motivated. They argue that there is "overwhelming evidence" to dispute a finding that the county was in poor financial shape and that Magistrate Judge Todd failed to take this into account. This evidence includes the fact that the county was owed $125,000 from Pennington himself- had he turned over the money in a timely fashion, the problem would have been alleviated. Also, the county was due at least another $135,000 from FEMA. The total of these two items ($260,000) is $120,000 more than the debts listed by Magistrate Judge Todd ($85,000 in unpaid bills and $55,000 for a new ambulance = $140,000).

The plaintiffs also point out that there is ample deposition testimony to dispute that the county was in poor

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[1] This goes beyond what the defendants asked for in their motion, but since the elements would be the same whether the case was against Pennington officially or individually, or against the Fiscal Court, Magistrate Judge Todd determined that the result should be the same as to all defendants.

financial shape. In this regard, they quote extensively from their response to the motion for summary judgment, arguing that just because Wagoner is a plaintiff, it does not diminish the fact that a fact-finder could find her credible based upon her knowledge and experience. They also argue that the outrageous statements made by Pennington and his supporters after the election show that the plaintiffs would be retaliated against, regardless of the budget situation. A fair inference from these statements is that economics was not the driving force behind the personnel decisions, but it was political retaliation. The fact that these statements were made *prior* to Pennington taking office or before he had the opportunity to learn of the county's finances lead to the conclusion that the economic justification defense is disingenuous. These statements at least create a fact question, making summary judgment inappropriate.

The plaintiffs contend that this case is identical to an earlier case before this Court, *Bradley v. Jordan*, Ashland Civil Action No. 94-26. Given an almost identical factual situation, the Court stated the following:

> Whether or not the Plaintiffs' political activities played a substantial or motivating role in the Defendants' decision not to rehire them is a question of fact, a determination of which should be made by a jury based on all the relevant facts and circumstances. Although the Defendants' reasons for failing to rehire several of the Plaintiffs may appear legitimate, there has been conflicting testimony by several employees of direct threats threat they would be fired in retaliation for supporting Johns.

> There is also disputed evidence regarding the state of the county budget on its effects on hiring decisions. Such genuine issues of material fact which go to the merits of the case preclude the Court from entering summary judgment for the Defendants.

They argue that a similar ruling is required here.

Also, they take issue with Judge Todd's recommendation that the § 1983 claim against Pennington in his official and individual capacities be dismissed on the same grounds. The defendants never addressed this in their motion for summary judgment and, therefore, waived their right to seek pretrial dismissal. Second, there is ample evidence of personal malice by Pennington.

In a reply, the defendants essentially argue that the plaintiffs presented insufficient evidence to raise a clear factual dispute as to the financial condition of the county. They argue that the plaintiffs only "proof" is the testimony of two individuals who were partly responsible for placing the county in the financial condition it was in on January 1, 1999. Further, the plaintiffs do not dispute that the pay cuts were across the board and, therefore, there is no evidence of disparate treatment.

The defendants also argue that this case is unlike the *Bradley* case because in *Bradley*, the plaintiffs were not rehired by the new administration. In this case, however, the plaintiffs quit their jobs because they were unhappy with temporary, across-the-board pay cuts and were terminated only afer they did not show up for work. In other words, they

chose to quit.

The parties also filed supplemental exhibits in further support of their positions. The plaintiffs filed an affidavit of plaintiff Lena Helwig in which she avers that Elliott County Magistrate Billy Ray Wilson told her on June 28, 2000, that "I didn't have anything to do with you all losing your jobs, that was all done and said before we took office." The plaintiffs contend that this contradicts the defendants' economic justification defense in that the employment decisions regarding the plaintiffs were made *prior to* the time the defendants accessed the financial records. They also cite *Reeves v. Sanderson Plumbing Prods., Inc.*, __ U.S. __, 120 S. Ct. 2097 (2000), in further support of their motion.

The defendants, in response, filed an affidavit of Billy Ray Wilson in which he avers that he did not make the statements attributed to him by Helwig. The defendants have also filed the Exit Conference Report of an audit completed June 14, 2000, by the State Auditor's Office. According to the defendants, this constitutes further independent and unbiased support for their position as to the financial condition of the county on January 1, 1999.

III. ANALYSIS

The test in cases of alleged political firing can be stated as follows. As part of their prima facie case, the plaintiffs must show (1) that their conduct was constitutionally protected; and (2) that such conduct was a substantial or motivating factor in the defendants' decision to take adverse action with respect to their employment. *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The Sixth

Circuit has stated that

> this analysis focuses on whether the adverse employment action was motivated in substantial part by the plaintiff' s constitutionally protected activity .... If the plaintiff meets her burden, the burden then shifts to the defendants to prove by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct.

Sowards v. Loudon County, 203 F.3d 426, 431 (6th Cir. 2000) (citations omitted). The burden shifting analysis from Title VII does not apply. *Id.* at 431-32 n.1. In other words, the burden does not then shift back to the plaintiffs to prove pretext.

Judge Todd concluded that, assuming the plaintiffs met their initial burden, the defendants had proven by a preponderance of the evidence that the employment decisions at issue would have been the same absent the protected conduct. It was his opinion that the defendants had shown by documentary evidence, not just argument and allegation, that the county's finances were in bad shape. The plaintiffs did not adequately refute this, offering only allegations, argument, and opinion in response. They provided no documentary or other evidence that the financial condition of the county was not as stated by the defendants. Given this, Judge Todd concluded that there was nothing for a reasonable jury to consider.

In this case, the defendants provided unrefuted evidence to the effect that David Blair (the outgoing County Judge Executive) was so disappointed that his candidate lost the election to succeed him that he immediately began plotting a financial sabotage of the county's finances. One witness testified that Blair told him that he would personally see to it that there would not be enough funds left in the county treasury by the time Pennington took office to buy a postage stamp and that he would see to it that there was not so much as a band-aid in the supply room of the ambulance service. Another witness testified that Blair invited her and other election "losers" to his home to plan their strategy against the county to undermine the incoming administration.

The following describes the financial condition of the County when Pennington took office.

- Pennington had turned over the $125,000 in tax monies prior to year-end, in accordance with a court order.

- Receipt of the FEMA funds were in question. The Blair administration had been responsible for applying for these funds, but it turns out they had failed to provide sufficient documentation for the original application. Pennington's administration was required to file new applications if the county expected to receive any of these funds. As a result, the county ultimately received $134,000 instead of the originally requested $181,000.

- Accounts held by the previous administration totaled $264,159.16. Pursuant to KRS § 68.310, the accounts should have totaled $472,945.20 or 35% of the total budget. One account had a negative balance and another had only 4¢ in it. The Blair administration had "borrowed" $265,000 from the Road Fund, which would have to be paid back prior to fiscal year-end in June.

- Approximately $85,000 in unpaid bills were outstanding. Some of these were over six months old.

- The ambulance service was not functional. The supply room was empty (apparently it did not even have a band-aid in it) and the ambulances did not have snow tires on them. One ambulance did not run at all and the other only had enough fuel to operate for a few hours. A former employee testified that he had been told that there was no money for the ambulance service and to drive the ambulances until they did not run and then park them. The county had hired a new ambulance, but owed $55,000 for it.

- The county garage was not operational. It had almost nothing in it - no supplies, no diesel fuel, no pipe, no salt, no equipment parts, little fuel for heat, no tools at all (apparently they had "disappeared") - and only had one operable piece of equipment, a backhoe. The

County Judge's car had sand in the radiator and water pump and other items were in need of repair or were inoperable.

- The county library had been closed for lack of heat and had numerous maintenance problems. During Blair's administration, the board had to purchase a new furnace when the county could not provide the funds. However, the county did not have the funds to provide fuel for the new furnace, so it still did not have heat. There was also no fuel for the PVA office, which also was closed toward the end of the Blair administration.

- County payroll from the Blair administration was approximately $74,000 per month.

The plaintiffs contend that the only financial problems were the $85,000 in unpaid bills and the $55,000 owed on one ambulance. However, this fails to take into account other evidence and ignores the additional money the county would have to spend to make several service departments functional at even a minimal level. All of the above is substantiated by documents and/or affidavits, mostly from third-parties.

Further, all of the evidence provided by the plaintiffs in support of their prima facie case is directed toward Pennington. They have not provided any evidence for their claim that the members of the Fiscal Court retaliated against them because of their political associations.

Regarding the *Bradley* case, the Court has reviewed that record and finds that that case is distinguishable on several grounds. First, the defendants in that case did not provide any support for their argument that the previous administration had left the county with financial problems. They simply stated that the county was $200,000 in debt and that "documentation existed" to prove this, but very little was provided as part of the record. More importantly, the county judge executive in the *Bradley* case admitted that the hiring decisions had been made *before* he had any knowledge of the county's financial situation. That case also did not seem to involve across-the-board pay cuts, but a selective failure to rehire.

There is also the issue of whether the claims should have been dismissed against Pennington in his individual capacity. The plaintiffs are correct that the defendants did not raise this in their motion for summary judgment. However, Magistrate Judge Todd concluded that the evidence against Pennington in his individual capacity would be the same as the evidence against Pennington in his official capacity. The only difference is that Pennington individually might raise a qualified immunity defense - the fact that Pennington was sued individually does not change the plaintiffs' and the defendants' evidence in the case. Therefore, if the evidence was insufficient to maintain a claim against the Fiscal Court and Pennington officially, then it was insufficient to maintain the claim against Pennington individually, as well.

In their supplemental filing, the plaintiffs have not provided any additional evidence contradicting the financial evidence previously offered by the defendants. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED:

(1) that the report and recommendation of the Magistrate Judge [Record No. 44] is **APPROVED and ADOPTED** as and for the opinion of the Court;

(2) that the defendants' motion for summary judgment [Record No. 36] is **GRANTED**;

(3) that the plaintiffs' federal claims are **DISMISSED WITH PREJUDICE** and plaintiffs shah take nothing thereby;

(4) that the plaintiffs' state claims are **DISMISSED WITHOUT PREJUDICE** to refile same in a court of competent jurisdiction;

(5) that this case be **STRICKEN** from the active docket of the Court; and

(6) that this is a final appealable Order.

This 27 day of September, 2000.

/s/ _____
Henry R. Wilhoit, Jr.,
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

[Filed April 28, 2000]

Civil Action No. 99-17

LENA HELWIG, et al.,)
Plaintiffs,)
v.)
)
CHARLES PENNINGTON, et al.,)
Defendants.)

REPORT & RECOMMENDATION

This matter is before the Court upon the defendants' motion for summary judgment [Record No. 36]. The motion was referred to the undersigned for a hearing and report and recommendation. The Magistrate Judge has determined that oral argument is not necessary.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The plaintiffs are all current or former employees of Elliot County Fiscal Court[1] who claim that they were retaliated against in early January of 1999 by defendant Charles Pennington shortly after he took office as County Judge Executive of Elliot County and the Fiscal Court. Pennington won the 1998 primary after David Blair, who had been County Judge Executive for 25 years, decided not to seek re-election. The plaintiffs claim that they were either fired, constructively discharged, or their pay was reduced because they were political supporters of both County Judge Executive David Blair and his "hand-picked successor," Mark Kazee, Pennington's opponent in the 1998 primary.[2]

Apparently, there was no love lost between Pennington and Blair even before Pennington ran for County Judge Executive. According to the defendant, Blair was resentful of

Pennington who, in his position as Sheriff of Elliot County, had served Blair with many suit papers, summonses, and garnishments. In their complaint, the plaintiffs describe the two men as "political rival[s]." The defendants claim that Blair sought to influence and control the county as an employee in Kazee's administration, should he win the

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[1] One plaintiff, Deborah Nickles, voluntarily dismissed her claim against the defendants and is no longer a party to this action.

[2] Neither Blair nor Kazee is a party to this action.

election.

The plaintiffs have sued Pennington and the Elliot County Fiscal Court under 42 U.S.C. § 1983 for retaliation for exercising their rights to free speech and association under the First Amendment. They have also brought state law claims pursuant to § 2 of the Kentucky Constitution and for wrongful discharge.

II. STANDARDS

Under Rule 56 of the Federal Rules of Civil Procedure, the Court must view the evidence in the light most favorable to the nonmoving party, in this case the plaintiffs. Thus, when examining the record, the Court will resolve doubts and construe inferences in favor of the plaintiffs in an effort to determine if any genuine issues of material fact exist. However, in a series of decisions commonly referred to as the "trilogy," *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the United States Supreme Court emphasized that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. In short, the "trilogy" requires the nonmoving party to produce specific factual evidence that a genuine issue of material fact exists.

The United States Court of Appeals for the Sixth Circuit has interpreted the "trilogy" to mean that the nonmoving party must produce enough evidence, after having

had a reasonable opportunity to conduct discovery, so as to withstand a directed verdict motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). As that court stated, "the movant could challenge the opposing party to 'put up or shut up' on a critical issue... [and] if the respondent did not 'put up,' summary judgment [is] proper." *Id.* at 1478.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Defendants' Position

The defendants argue that the plaintiffs cannot prove that their political affiliation was a "substantial" or "motivating" factor in the Fiscal Court's decisions regarding their employment. Rather, it was the county's dire financial condition that caused the across-the-board decision to reduce the Elliott County payroll.

The defendants claim that David Blair deliberately caused the county's financial situation. Blair allegedly made it clear before the primary race that if his candidate, Mark Kazee, did not defeat Pennington, he would devote himself during the remainder of his term to destroying the financial integrity of the county in order to ensure that the incoming County Judge Executive would not be able to successfully run the county government. Blair allegedly made statements to the effect that Elliott County would be so broke when Pennington took office that it would not be able to buy a postage stamp, and there would not be so much as a band-aid left in the county-operated ambulance service. A former Elliot County Magistrate claims that Blair called her on the eve of the

election to attend a meeting at his home to plot the financial destruction of the county, but the Magistrate refused and resigned the next day.

After the primary, Blair, with the assistance of the "lame duck" Fiscal Court, added county employees (including at least two of the plaintiffs) and granted pay raises to all county employees. The county treasurer resigned four days before the new administration took office, leaving the county's books and financial records in a state of confusion and disarray and rendering them useless to the incoming administration. Joe Morris of the Kentucky Department for Local Government concluded in January of 1999 that he was unable to obtain sufficient financial information to full assess Elliott County's actual financial position at that time.

Pennington claims that when he took office on January 1, 1999, one bank account had 4¢ in it and another was overdrawn by $2,900.00. The County also owed $84,000 in unpaid bills, some more than eight months past due, and owed $55,000 for a new ambulance that had been ordered, but not paid for. The gas tanks used to heat county offices were so empty or close to empty that the PVA office and public library had to close prior to the first of the year because of lack of heat. The ambulance service had enough fuel for only a couple of hours' service and there was not even a band-aid in the supply room. None of the four ambulances had snow tires and one would not start. The road department had only one operable piece of machinery-a backhoe-and all tools had disappeared from the garage, requiring the purchase of replacement tools. There was no diesel fuel, no gasoline, no oil, no gravel, no pipe or tile, and no salt in case of

emergency (assuming an operable track could be located).

In addition, the county had received a $22,638 grant for the new ambulance it had ordered, but the funds were never earmarked and could not be located, and were never applied to the balance due. The county police department had been funded in part by a federal grant. However, Blair's son, who was responsible for obtaining the grant, either did not complete the paper work or completed it incorrectly and, as a result, the grant was never received. The county had failed to pay insurance premiums of approximately $37,600 that were due in July of 1998. In sum, Blair had fulfilled his promise to leave the county in financial shambles for the Pennington administration.

As a result of this financial situation, the Fiscal Court voted unanimously on January 4, 1999, to abolish the county police department and instead fund two deputies for the sheriff's office. The county also applied for and received two emergency grants from the Commonwealth of Kentucky totaling $71,786 and were given two dump trucks in order to make the road department functional. The county also received an additional $134,927 from FEMA. In addition, Pennington and the Fiscal Court advised all county employees that each would be required to take a pay cut, down to minimum wage levels in some cases, until such time as additional funds were available to increase their salary levels. This was an across-the-board cut, but all workers were asked to stay on the job.

Several of the plaintiffs in this action simply did not return to work after being advised of the pay cut and, as a

result, their jobs were terminated. One plaintiff continues to work for the county in another capacity, but bases her claim on a reduction in pay. Other plaintiffs are in this case because the Fiscal Court abolished their positions.

Of the employees that elected to work at reduced levels of pay and stay on the job, their salaries were increased by $2,000 each in March of 1999 and again in July 1999 because of the improved financial condition of the county. Without the measures taken by the defendants, the county would have been unable to finish its fiscal year with a positive balance in its accounts, as required by Kentucky law. The actions taken with respect to the plaintiffs' positions were necessary because of financial considerations caused by Blair and his supporters-political affiliations were not a substantial or motivating factor in the decisions. Because the plaintiffs cannot show this essential element, their claim fails.

The defendants also argue that Pennington did not possess the power by virtue of state law to hire and/or remove county employees without the approval of the Fiscal Court. Therefore, the plaintiff's § 1983 claim against Pennington alone cannot stand because Pennington could not have been acting under color of state law in fixing salaries and determining whether to abolish certain positions. This power is solely vested with the Fiscal Court.

B. Plaintiff's Position

The plaintiffs respond that there is ample evidence to refute the defendants' "economic justification" defense. Both David Blair and Debbie Wagoner-the two individuals who

possessed the most knowledge of the Fiscal Court's financial situation-firmly and unambiguously testified that there was no financial crisis, just a temporary cash-flow problem caused solely by Pennington. As Sheriff, Pennington had collected approximately $125,000 in tax monies, but had refused to turn that money over to the Fiscal Court, in violation of a court order to do so. Therefore, it was Pennington, and not Blair, who caused the county's financial "crisis."

Plaintiff Debbie Wagoner served as county treasurer until December 28, 1998, and has the most knowledge regarding the county's financial situation. She consistently testified that there was no real shortage of money in the county and that Pennington's false claims of financial ruin conveniently ignored the tax monies he held, as well as the FEMA money, which' together totaled approximately $300,000, more than enough to alleviate any cash flow problems. Further, according to Wagoner, the Pennington administration now employs *more* employees that the Blair administration did. Blair testified similarly that there was no problem with finances, other than Pennington's unlawful withholding of collected tax monies.

There is other evidence to suggest that the plaintiffs were fired because of their political affiliations. Former administrative assistant Sandy Hays testified as follows:

> My immediate supervisor was Dale Howard, who was the director of emergency services, who told me quite frankly that he was told by Mr. Pennington that whoever David Blair hired he could fire, that and as I said I was

> told by Mr. Pennington that I would not be, I would not be working for him. Right to the everyday people working in the trenches for Elliott County Ambulance Service that had heard they had heard. So I am repeating what they have heard. So I can't verify what they have heard either.

(Hays Depo. at p. 19.) Pennington also allegedly told Debbie Wagoner, before he ever had any knowledge of the county's finances, that he "could get rid of us all" and that he had "a whole sack full" of job titles. He also allegedly promised plaintiff Deborah Nickles he would "fire anyone he wanted" because he could bring in others "on a different title, cause he had a sack full of titles." She also heard Pennington's son, who is currently employed by the county, tell another witness "that Dad is going to get rid of everybody that worked for David Blair before it is all done." The Fiscal Court's participation in these job actions were foreshadowed by Magistrate Diane Penix, who allegedly told plaintiff Lena Helwig on election night that she [Helwig] "would be looking for a job." Magistrate Gary Porter had allegedly told plaintiff James Frazier that his "job may be in crisis" if he supported Kazee in the election.

Further, Pennington arrived at the county garage on January 4, 1999, with four campaign supporters and soon-to-be county employees, to talk with several of the plaintiffs. While Pennington claims he asked the workers to stay on at their jobs, his "offer" was a flagrant violation of minimum wage laws because he stated that time spent returning to the garage from being out in the county would not be

compensable. Pennington's untenable "offer" was for no paid holidays, no vacation days, no sick days, and working until 4:00 p.m. every day, even if it took another 1 ½ hours "on employees' time" to get the equipment back to the garage. This was clearly against Kentucky regulations regarding travel time, 805 K.A.R. § 1:065(7)(3), and caused certain of the plaintiffs to refuse future employment, thus constructively discharging them.

Based upon the above, it is clear that there is ample evidence to refute the defendants' argument that the employment decisions were financially justified. On the contrary, as shown by the evidence produced by the plaintiffs, Pennington and the Fiscal Court had already decided to "get rid of" the plaintiffs because of their political affiliation with and support of Pennington's political opponent before they knew anything of the county's financial situation. Therefore, the defendants' motion should be denied.

The plaintiffs also counter that Pennington, as County Judge Executive, is the final policymaker in Elliott County. ha support of this argument, they rely on a recent unpublished decision by the Sixth Circuit, *Whittle v. Floyd*, No. 96-5403 (6th Cir. Dec. 21, 1999), wherein the court found that the County Judge Executive was the final decisionmaker, not the Fiscal Court. Therefore, the defendants' motion should be denied.

C. Defendants' Reply

In their reply, the defendants counter that the plaintiffs offer absolutely no proof to support their unsubstantiated

allegations. On the other hand, the defendants have supplied a number of well-respected citizens of Elliott County, employee affidavits, bank records, checks, and independent audit recommendation in support of their position. Blair's own auditors have not, to date, been able reconcile the Blair administration records, of which Debbie Wagoner was the treasurer, and have been unable to provide a report of the status of the county as of December 31, 1998.

The defendants further point out that the cuts made in payroll were across the board. There was no disparate treatment of the plaintiffs. They were treated the same as all other county employees. Further, several third parties - parties who have no interest in this lawsuit - have testified in support of and corroborated the defendants' position.[3] The defendants also contend that attached payroll records demonstrate that the county acted for the purpose of saving a substantial amount of money in abolishing the police force. Likewise, the abolition of the positions of Road Department Secretary and full-time courthouse janitor were for financial reasons, not political reasons.

By their own admissions, several of the plaintiffs elected to quit their positions rather than stay on the job at a

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[3] These include Curt Davis (former superintendent of Elliott County Schools), Lavona Cox (former Magistrate of Elliott County), Floyd Blanton (employee in Blair administration since 1979), James Ishmel Fannin (current Elliott County Road Foreman), Victoria Hargraves (Elliott County librarian), Lovell Mayse, (Elliott County PVA), and Reggie Dickerson (Elliott County Emergency Manager).

reduced rate of pay. Pennington specifically asked that they stay on the job and some employees elected to do so. There was no disparate treatment here.

The Blair administration was required by Kentucky law to leave the incoming Fiscal Court with 35% of the budgeted expenditures, or $472,945.20. However, only $264,159.16 was left for the new administration and this figure did not account for the over $80,000 in unpaid bills, monthly payroll of $74,000+, an inoperable County Road Department and Ambulance Service, and $265,000 that had been borrowed from the Road Fund, which had to be repaid. As a result, the County was approximately $250,000 in debt as of January 1, 1999.

The defendants contend that the plaintiffs' "evidence" to refute an economic justification defense is a smokescreen. Pennington had, in fact, tendered the $125,000 in tax monies as agreed upon on December 30, 1998.[4] Further, the FEMA money that Elliott County ultimately received was only $134,927, not the $181,000 plaintiffs suggested and the reduced amount was received only due to a second application had to be submitted because Blair's administration had submitted an incomplete or inaccurate application.

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[4] Pennington contends that he tried to tender the monies to several Blair administration employees, but they stated that they no longer had the authority to accept the funds. Therefore, Pennington says, he tendered the monies to the new incoming sheriff, with the authorization of County Attorney David Flatt.

The defendants further contend that their economic justification defense is bolstered by Joe Morris, the Local Government Advisor. He advised Pennington that the 12/31/98 quarterly report was so riddled with errors that it was useless. Further, Elliott County qualified for $24,000 in state county road emergency aid. This bolsters the defendants' position that the County was in financia! crisis.

The plaintiffs also falsely contend that they were fired. All but three plaintiffs were given a choice and chose to quit. The other three plaintiffs' positions were abolished in an attempt to cut expenses. There is no proof of disparate treatment-the pay cuts were across the board and the abolished positions were justified.

The defendants also argue that Pennington, as the County Judge Executive, does not have the power either to fix salaries or abolish positions. The cases cited by the plaintiffs have different fact patterns - they did not involve the setting of wages, which is within the sole discretion of the Fiscal Court pursuant to KRS {} 64.530. Because Pennington alone did not possess power by virtue of state taw to change salaries or abolish positions, then he cannot alone be held liable under § 1983 for such actions.

Finally, the defendants contend that the plaintiffs have failed to meet their burden of establishing that the defendants' economic justification is pretextual. The plaintiffs have failed to show that the financial explanation had no basis in fact, that this reason did not actually motivate the changes in employment, or that the economic condition of the county was insufficient to motivate the actions taken.

IV. ANALYSIS

A. Section 1983 Liability

In *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the United States Supreme Court set out *the prima facie* case for a political retaliation cause of action. The plaintiffs must show (1) that their conduct was constitutionally protected; and (2) that such conduct was a substantial or motivating factor in the defendants' decision to take adverse action with respect to their employment. As recently noted by the Sixth Circuit,

> this analysis focuses on whether the adverse employment action was motivated in substantial part by the plaintiff's constitutionally protected activity .... If the plaintiff meets her burden, the burden then shifts to the defendants to prove by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct.

Sowards v. Loudon County, 203 F.3d 426, 431 (6th Cir. 2000) (citations omitted).

The first prong of the test appears to be satisfied in this case. Political beliefs of employees are protected by the First Amendment so long as the hiring authority is unable "to demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The

defendants have not made any such allegation in this case. Therefore, the main issues are (1) whether the plaintiffs' political beliefs and affiliations were a substantial or motivating factor in the employment decisions made; and (2) if so, whether the defendants have proven that the same employment decisions would have been made absent the protected conduct.[5]

In support of their argument that political affiliation was a substantial factor in the adverse actions taken, the plaintiffs make several contentions: (1) Pennington and/or members of his family made certain statements implying he would "clean house" when he became County Judge Executive; (2) the financial condition of the county could not have been a motivating factor because Pennington held $125,000 in tax monies and $180,000 was due in FEMA monies and these were sufficient to resolve any cash flow problems; and (3) Pennington actually employs *more* employees than Blair employed in his administration, indicating a strong financial condition.

Regarding the financial condition of the county, the plaintiffs offer nothing in support of this argument other than the deposition testimony of plaintiff Debbie Wagoner and

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[5] The Court notes that the burden shifting analysis borrowed from Title VII cases and urged by the defendants, as discussed in *Whitaker v. Wallace*, 170 F.3d 541,544 (6th Cir. 1999), does not apply. *Sowards*, 203 F.3d at 431-32 n.1. The *Sowards* case was decided after the defendants had filed their reply brief in this matter.

David Blair to the effect that the county was in good financial condition. They offer no documentary evidence and nothing but their own arguments and allegations. In the alternative, the plaintiffs argue that if the financial condition of the county was not good, then it was Pennington's fault. Again, they offer no documentary evidence to support this argument. In fact, the evidence presented by Pennington requires a conclusion that the tax monies were turned over by Pennington on or before December 31, 1998, as ordered. Their third contention, that Pennington now employs more employees than Blair did, is both unsupported and irrelevant.[8] The only evidence of any political motivation that they have presented are the statements allegedly made by Pennington. Based upon this, the Magistrate Judge questions whether the plaintiffs have provided evidence on which the jury could reasonably find that the adverse employment actions alleged were motivated in substantial part by the plaintiffs' political affiliations.

However, even if it is assumed that the plaintiffs have made out their prima facie case, the Magistrate Judge concludes that the defendants have proven by a preponderance of the evidence that the employment decisions would have been the same absent the protected conduct. They have submitted numerous documents which support their argument that the county was in poor financial shape when Pennington's

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[8] Assuming this is true, the plaintiffs offer nothing regarding when these alleged additional hirings took place. It is entirely possible that the hirings were due to the improved financial condition of the county based upon Pennington's actions after he took office.

administration took over. Blair's administration had left approximately $85,000 in unpaid bills from 1998. The county had ordered an ambulance for $55,000 and received a grant of $23,000 to pay for it, but the grant was never applied to the balance, so the entire balance was still due and owing. Bank statements and/or financial statements show that one account had a negative balance and another had only 4¢ in it. Gas tanks used to heat county offices were left empty, the ambulance service and road departments were all but inoperable,[9] county agencies had to close because of lack of heat - all evidence that the county's finances were in very poor shape when Pennington took office.

Joe Morris and Lonnie Campbell of the Department for Local Government both testified by affidavit that they were unable to obtain sufficient financial information to fully assess the county's financial condition in January of 1999 and once the year-end numbers were finally obtained, they contained numerous discrepancies and inaccuracies. They advised Pennington to pay the past due bills while at the same time clearing up any negative balance, requiring Pennington

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[9] The conditions of the ambulance service and road departments were particularly troubling. None of the ambulances had snow tires on them. There was only enough fuel for a few hours' of service. One of the ambulances would not run at all. The supply room was empty. The only operable piece of equipment in the road department was a backhoe. All of the tools had "disappeared" from the garage, and their was no diesel fuel or gasoline or salt in case of an emergency. As a result, it appears that at least two major county services were completely unavailable to the citizens of Elliott County.

to increase county revenues and/or decrease county services and reduce all non-mandated expenses. Also, the Blair administration had failed to provide sufficient documentation for a FEMA grant of $181,000, which required the Pennington administration to file a new application. Because they could not justify the $181,000, the county ultimately received only $135,000 from FEMA. The county obtained an emergency grant of at least $35,000 and two dump tracks for its road department. There is further unrefuted evidence that the positions that were abolished were abolished for financial and not political reasons.

The defendants have also submitted the affidavits of two non-party witnesses, Curt Davis and Lavona Binion Cox, who state that Blair told them in so many words that it was his goal to leave the county in a poor financial condition at the end of his administration. This further supports their position that the county's finances were, in fact, in such condition.

The plaintiffs do not offer any evidence to refute the evidence presented by the defendants. Further, they do not contest that salary reductions were made across the board and not just with respect to the particular plaintiffs -- supporters of both candidates were apparently caught in the crosshairs. This weighs very heavily in favor of a finding that political affiliations were not a substantial or motivating factor in the decision and that the plaintiffs were not discriminated against because of their political affiliations, but that the actions were necessary because of a financial situation brought about in part by Blair.

Based upon the documentary evidence and affidavits supplied by the defendants, they have shown that the financial condition of the county was not as represented by the plaintiffs, but required the employment decisions made by the defendants. The plaintiffs have not adequately refuted this evidence and only provide argument and allegations in response. The plaintiffs have also not come forth with any evidence of retaliation as against any of the members of the Fiscal Court, only Pennington. As a result, the evidence is so one-sided in this case the Magistrate Judge concludes that there is nothing for a reasonable juror to consider and the plaintiffs cannot prevail on their § 1983 claim against the Fiscal Court as a matter of law.

B. Liability of Pennington Under § 1983

The defendants have also moved to dismiss the § 1983 claims against Pennington in his official capacity on the basis that Pennington alone did not have the power to cut salaries or abolish the positions at issue. There is no mention of the § 1983 claims against Pennington in his individual capacity.

Based upon the Magistrate Judge's conclusion above that the defendants have proven by a preponderance of the evidence that the same employment decisions - regardless of whether they were made by the Fiscal Court or by Pennington - would have been made absent the protected conduct, the plaintiffs cannot prevail on their § 1983 claims against Pennington either in his official or individual capacity. The plaintiffs must still prove their retaliation case against Pennington, but the evidence in this case, all of which is directed at Pennington, is insufficient to support a verdict in

their favor. Therefore, the Magistrate Judge recommends that these claims be dismissed as well. As a result, the Court need not consider the arguments of the parties regarding whether Pennington was the final decision maker.

V. CONCLUSION

Based upon the above, the Magistrate Judge recommends that all of the plaintiffs' § 1983 claims be dismissed. As a result, only state claims remain. The supplemental jurisdiction statute, 28 U.S.C. § 1367, explicitly allows a trial court to dismiss pendent state law claims where all federal claims have been dismissed.[10] Moreover, the Magistrate Judge has engaged in a consideration of"the interests of judicial economy and the avoidance of multiplicity of litigation and [has] balance[d] these interests against needlessly deciding state law issues" and concludes that dismissal of the plaintiffs' state law claims is warranted. *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993). Finally, the Sixth Circuit Court of Appeals has held that as a general matter where the federal claims are dismissed before trial, pendent state claims should be dismissed as well. *Id.* Accordingly,

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[10] This section states in part that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-... the district court has dismissed all claims over which it has original jurisdiction....

28 U.S.C. § 1367(c)(3).

IT IS HEREBY RECOMMENDED:

(1) that the defendants' motion for summary judgment [Record No. 36] be **GRANTED**;

(2) that the plaintiffs' federal claims be **DISMISSED WITH PREJUDICE**;

(3) that the plaintiffs's state claims be **DISMISSED WITHOUT PREJUDICE** to refile same in a court of competent jurisdiction; and

(4) that this case be **STRICKEN** from the active docket of the Court.

The Clerk of the Court shall forward a copy of this report and recommendation to the respective parties who shall, **WITHIN TEN (10) DAYS** of receipt thereof, **SERVE and FILE** timely written objections to the Magistrate Judge's Report and Recommendation with the District Court or else waive the right to raise the objections in the Court of Appeals. 28 U.S.C. § 636(b)(1)(B); *Thomas v. Am*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); *Wright v. Holbrook*, 794 F.2d 1152, 1154-55 (6th Cir. 1986); Fed. R. Civ. P. 6(e).

This 28th day of April, 2000.

/s/_____
JAMES B. TODD,
UNITED STATES MAGISTRATE JUDGE